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# ATTORNEYS' FEES IN ENVIRONMENTAL CITIZEN SUITS: SHOULD PREVAILING DEFENDANTS RECOVER?

KERRY D. FLORIO\*

*Attorneys' fees in environmental citizen suits enable private citizens to enforce environmental legislation. First introduced in the federal Clean Air Act, attorney's fee provisions are now included in virtually all environmental legislation. Without provisions for the award of attorneys' fees, legislation allowing for private citizen enforcement would be practically meaningless. Attorneys' fees provisions typically allow for prevailing parties to be awarded attorneys' fees when it is "appropriate." The appropriateness standard has routinely justified awarding attorneys' fees to prevailing plaintiffs, while defendants have commonly been awarded fees only when a suit is deemed frivolous, harassing, or without merit. This Comment explores how prevailing defendants continue to rely on the language of the applicable statutes to argue that they are entitled to attorneys' fees as prevailing parties, and how the principles of equity can provide a better basis for awarding attorneys' fees to prevailing defendants.*

## INTRODUCTION

Environmental citizen suits enable and empower citizens to enforce environmental legislation.<sup>1</sup> These suits are made possible by the inclusion of attorneys' fees provisions in virtually all environmental statutes.<sup>2</sup> Without attorneys' fees provisions, citizens are often unable to enforce environmental legislation because the costs of litigation are

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\* Articles Editor, 1999-2000, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW.

<sup>1</sup> See, e.g., Clean Air Act, 42 U.S.C. §§ 7401-7671 (1994); Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387 (1994); Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992 (1994); Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601-9675 (1994); Toxic Substances Control Act, 15 U.S.C. §§ 2601-2692 (1994); Surface Mining Control and Reclamation Act, 30 U.S.C. §§ 1201-1328 (1994); see also ROBERT L. ROSSI, ATTORNEYS' FEES § 10:34, at 696 (2d ed. 1995).

<sup>2</sup> See, e.g., Clean Air Act, § 304(d), 42 U.S.C. § 7604(d); Endangered Species Act of 1973, § 11(g)(4), 16 U.S.C. § 1540(g)(4); Resource Conservation and Recovery Act of 1976, § 7002(e), 42 U.S.C. § 6972(e); Safe Drinking Water Act, § 1449(d), 42 U.S.C. § 300j-8(d); Emergency Planning and Community Right-To-Know Act, § 326(f), 42 U.S.C. § 11046(f).

too high.<sup>3</sup> Attorneys' fees provisions allow attorneys to represent citizens with the anticipation that defendants will pay their fees if the citizen plaintiffs prevail.<sup>4</sup>

Federal legislators enacted citizen suit provisions with attorneys' fees provisions in an effort to encourage the enforcement of environmental legislation by private citizens or citizen organizations. However, defendants are also attempting to obtain attorneys' fees from the citizen plaintiffs, whenever they prevail in citizen suits.<sup>5</sup> Statutory language in environmental legislation typically states that attorneys' fees may be awarded to "any party" when "appropriate."<sup>6</sup> Plaintiffs, usually non-profit citizen organizations, obtain attorney's fee awards when they are the prevailing party in almost all circumstances, provided the case was brought in good faith.<sup>7</sup>

Historically, defendants have received attorneys' fees only in limited circumstances.<sup>8</sup> When considering a fee award for prevailing defendants, courts follow the decision in *Christiansburg Garment Company v. Equal Employment Opportunity Commission*, which held that, under the fee-shifting provision of Title VII of the Civil Rights Act of 1964, fees should not be awarded to prevailing defendants unless the district court finds "that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith."<sup>9</sup> Defendants, however, often argue that they are entitled to attorneys' fees as the prevailing party, not just when a suit is frivolous.<sup>10</sup> Only one court has awarded a prevailing defendant fees, and it did so without any analysis of what standard should be applied.<sup>11</sup>

This Comment examines the development of citizen suits and attorneys' fees provisions and suggests that attorneys' fees awards should only be made to defendants when they are equitable. Section I examines citizen suit provisions and the role citizens play in the enforcement of environmental legislation. This section also discusses the

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<sup>3</sup> See MICHAEL D. AXLINE, ENVIRONMENTAL CITIZEN SUITS § 8.03, 8-2 (1995).

<sup>4</sup> See *id.*

<sup>5</sup> See, e.g., Brief for Defendant, Citizens for a Better Env't v. The Steel Co., No. 95-C-4534 (9th Cir. 1998) [hereinafter Steel Co. Brief].

<sup>6</sup> See, e.g., Clean Air Act, § 304(d), 42 U.S.C. § 7604(d) (1994).

<sup>7</sup> See JEFFREY G. MILLER & ENVIRONMENTAL LAW INSTITUTE, CITIZEN SUITS: PRIVATE ENFORCEMENT OF FEDERAL POLLUTION CONTROL LAWS § 9-4, 102 (1987).

<sup>8</sup> See *Christiansburg v. EEOC*, 434 U.S. 412, 421 (1978); *Carrion v. Yeshiva University*, 535 F.2d 722, 727 (2d Cir. 1976); see also, AXLINE, *supra* note 3, at 8-14.

<sup>9</sup> *Christiansburg*, 434 U.S. at 421.

<sup>10</sup> See generally Steel Co. Brief, *supra* note 5.

<sup>11</sup> See *Sierra Club v. Shell Oil*, 817 F.2d 1169, 1176 (5th Cir. 1987).

impact and importance of attorneys' fees provisions in the development and effectiveness of citizen suits. Section II traces the development of attorneys' fees provisions in citizen suits and how courts interpret these statutes. Section III discusses arguments defendants often make in requesting attorney fee awards. Section IV suggests that Congress gave the courts discretion to award fees when equitable or "appropriate," and to both plaintiffs and defendants when the court determines that the award is equitable in light of the circumstances of that case.

### I. CITIZEN SUITS AND ENVIRONMENTAL ENFORCEMENT

Citizen participation is essential to the enforcement of environmental legislation.<sup>12</sup> Environmental law was not the first area of law to include citizen involvement in the enforcement of legislation.<sup>13</sup> Prior to the enactment of environmental citizen suit provisions, there were existing doctrines allowing for the private enforcement of laws such as the antitrust treble-damage provision, stockholder derivative suits under the securities law, and the doctrines of private right of action and statutory tort.<sup>14</sup> Citizen suit provisions in environmental legislation, however, were the first provisions empowering private citizens to act as "private attorneys general," enforcing statutory rights for the benefit of the community as a whole, rather than personal benefit.<sup>15</sup>

Today, citizen enforcement is one of the primary means of enforcing environmental legislation.<sup>16</sup> Without effective citizen participation, much of this legislation would simply go unenforced.<sup>17</sup> There are several reasons why enforcement would be inadequate if citizens were prevented from bringing suit.<sup>18</sup> First, public officials and agencies do not or are not capable of effectively policing the system due to insufficient funds, inadequate staff, or lack of expertise.<sup>19</sup> Second,

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<sup>12</sup> See George Van Cleve, *Congressional Power to Confer Broad Citizen Standing in Environmental Cases*, 29 ENVTL. L. REP. 10,028 (1999).

<sup>13</sup> See AXLINE, *supra* note 3, at 1-2; Jeffrey G. Miller, *Private Enforcement of Federal Pollution Control Laws, Part I*, 13 ENVTL. L. REP. 10,309, 10,309 (1983) [hereinafter *Private Enforcement*].

<sup>14</sup> See *Private Enforcement*, *supra* note 13, at 10,309.

<sup>15</sup> See MILLER, *supra* note 7, at 1.

<sup>16</sup> See Van Cleve, *supra* note 12, at 10,028.

<sup>17</sup> See Walter B. Russell, III & Paul Thomas Gregory, *Awards of Attorneys' Fees in Environmental Litigation: Citizen Suits and the "Appropriate" Standard*, 18 GA. L. REV. 307, 324-25 (1984).

<sup>18</sup> See *id.*

<sup>19</sup> See *id.*

agencies may be lax or unwilling to aggressively prosecute violators due to political pressure, alignment with the special interests those agencies are intended to regulate, or because the agencies themselves promote the activity that they should be regulating.<sup>20</sup> Finally, citizen suits reduce the government's enforcement burden.<sup>21</sup> Because the government has a limited amount of resources with which to enforce environmental legislation, encouraging citizen suits permits a greater level of enforcement.<sup>22</sup> Citizen suits utilize private resources, saving the government money and permitting a more efficient administration of legislative policies.<sup>23</sup>

All major federal environmental laws—including the Clean Air Act (CAA);<sup>24</sup> the Federal Water Pollution Control Act, commonly known as the Clean Water Act (CWA);<sup>25</sup> the Resource Conservation and Recovery Act (RCRA);<sup>26</sup> and the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)<sup>27</sup>—contain essentially the same citizen suit provisions.<sup>28</sup> The provision originated in Section 304 of the Clean Air Act.<sup>29</sup> After the enactment of Section 304 of the CAA, Congress “lifted” this section into all new federal environmental statutes or major amendments to those statutes.<sup>30</sup>

#### A. Legislative History of the Citizen Suit Provision

The 1970 amendments to the CAA included the new citizen suit provision in a congressional attempt to rectify the then prevailing inadequate methods of environmental enforcement.<sup>31</sup> Given the in-

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<sup>20</sup> See *id.*

<sup>21</sup> See *id.* at 325.

<sup>22</sup> See Russell & Gregory, *supra* note 17, at 325 n.83.

<sup>23</sup> See *id.* 325.

<sup>24</sup> 42 U.S.C. §§ 7401–7671 (1994).

<sup>25</sup> 33 U.S.C. §§ 1251–1387 (1994).

<sup>26</sup> 42 U.S.C. §§ 6901–6992 (1994).

<sup>27</sup> 42 U.S.C. §§ 9601–9675 (1994).

<sup>28</sup> See Robert D. Snook, *Environmental Citizen Suits and Judicial Interpretation: First Time Tragedy, Second Time Farce*, 20 W. NEW ENG. L. REV. 311, 313–14 (1998). Other lesser known environmental statutes also contain such a provision, including the Toxic Substances Control Act, 15 U.S.C. §§ 2601–2692 (1994), and the Surface Mining Control and Reclamation Act, 30 U.S.C. §§ 1201–1328 (1994).

<sup>29</sup> See Snook, *supra* note 28, at 314; see also CAA, § 304(d), 42 U.S.C. § 7604(d).

<sup>30</sup> See Snook, *supra* note 28, at 314. The result is that in some cases, citizens have the ability to enforce more provisions of acts than the Environmental Protection Agency (EPA). See *Private Enforcement*, *supra* note 13, at 10,310. For example, citizens have the ability to enforce more provisions of RCRA than EPA. See *id.*

<sup>31</sup> See *Private Enforcement*, *supra* note 13, at 10,309; see also CAA, § 304(d), 42 U.S.C. § 7604(d) (1994).

creased interest in environmental protection when the amendment was enacted, opponents faced the political implications of opposing a "pro-environmental" legislation, which hindered their opposition to the legislation.<sup>32</sup> The citizen suit provision of the CAA was sharply debated, and tension ensued between Congress's intent to encourage citizen participation in environmental enforcement and Congress's simultaneous desire to prevent citizen interference with governmental enforcement.<sup>33</sup>

Some legislators viewed citizen suits as an inexpensive alternative to government enforcement, and included the provision in an effort to encourage EPA to act when appropriate.<sup>34</sup> Others wanted the provision to allow citizens to act as private attorneys general and enforce the laws directly.<sup>35</sup> This approach assumed that citizens affected by pollution would be especially motivated and, therefore, uniquely effective advocates.<sup>36</sup> Other proponents argued that citizen suits would curb the untrustworthiness or lack of will of federal environmental agencies, and also argued that the inevitable lack of sufficient resources prevented these agencies from adequately addressing all statutory violations.<sup>37</sup>

Opponents of the provision feared that citizen suits would increase the pressure upon already overburdened courts, and hinder the government's own regulatory actions.<sup>38</sup> Others were concerned that because citizen suits were not controlled by a single national agency, they would result in inconsistent and haphazard application of environmental laws.<sup>39</sup> After considerable debate, Congress adopted the resulting citizen suit provision of the CAA, which granted citizens the ability to sue.<sup>40</sup>

Still, requirements designed to encourage and provide for agency enforcement have restricted these suits.<sup>41</sup> First, before bringing suit, citizens have been required to notify the appropriate agencies, giving

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<sup>32</sup> See *Private Enforcement*, *supra* note 13, at 10,310.

<sup>33</sup> See Snook, *supra* note 28, at 315.

<sup>34</sup> See *id.* at 316.

<sup>35</sup> See *id.*

<sup>36</sup> See *id.*

<sup>37</sup> See *Conservation Law Found. v. Browner*, 840 F. Supp. 171, 174 (D. Mass. 1993); *Private Enforcement*, *supra* note 13, at 10,310.

<sup>38</sup> See *Private Enforcement*, *supra* note 13, at 10,310; Snook, *supra* note 28, at 316.

<sup>39</sup> See Snook, *supra* note 28, at 316.

<sup>40</sup> See Clean Air Act § 304(d), 42 U.S.C. § 7604(d); *Private Enforcement*, *supra* note 13, at 10,310.

<sup>41</sup> See *Private Enforcement*, *supra* note 13, at 10,310.

them the opportunity to bring suit in lieu of a citizen action.<sup>42</sup> Additionally, citizens have not been allowed to sue for damages, only to redress statutory violations.<sup>43</sup> Legitimate citizen suits have been encouraged by the attorneys' fees provision included in the statute, while at the same time frivolous suits have been discouraged by the fear of fees being awarded to prevailing defendants in those circumstances, thus easing the threat of an increased burden upon the courts.<sup>44</sup> Following the 1970 amendments to the CAA, all new federal environmental statutes have included citizen suit provisions, and most existing statutes were amended to include such provisions, except the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).<sup>45</sup>

### B. *The Importance of Citizen Suits in Environmental Enforcement*

Citizen suits are fundamental to the effective enforcement of environmental legislation.<sup>46</sup> These provisions are an integral part of virtually every federal environmental statute.<sup>47</sup> Citizen suits serve as the "essential backbone" of citizen participation in environmental decision-making by government, and provide for increased scrutiny of environmental law compliance by private industry.<sup>48</sup> As the Third Circuit has noted: "Congress intended citizen suits to both goad the responsible agencies to more vigorous enforcement of the anti-pollution standards and, if the agencies remained inert, to provide an alternative enforcement mechanism."<sup>49</sup> The legislative history of the CAA "suggests a sensitive handling of citizen suits, reflecting Congress's conviction that such suits can perform an indispensable function."<sup>50</sup>

In subsequent amendments to environmental legislation, Congress has noted the value of citizen suits in environmental enforcement.<sup>51</sup> The Senate Report on the 1987 amendments to the CWA proclaimed citizen suits a "proven enforcement tool" that had "de-

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<sup>42</sup> See *id.*

<sup>43</sup> See *id.*

<sup>44</sup> See *id.* The attorneys' fees award provision is discussed in Section II, *infra*.

<sup>45</sup> See *id.*

<sup>46</sup> See Van Cleve, *supra* note 12, at 10,028.

<sup>47</sup> See *id.* This feature in American environmental law distinguishes it from the less successful programs in other countries, which involve little to no citizen participation. See *id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Baughman v. Bradford Coal Co.*, 592 F.2d 215, 218 (3d Cir. 1979).

<sup>50</sup> *Gardeski v. Colonial Sand & Stone Co.*, 501 F. Supp. 1159, 1168 (S.D.N.Y. 1980).

<sup>51</sup> See Amicus Brief at 17, *Marbled Murrelet v. Pacific Lumber Co.*, 182 F.3d 1091 (9th Cir. 1999) (No. 98-15788) [hereinafter Murrelet Amicus Brief].

tered violators and achieved significant compliance gains.<sup>52</sup> Senator Mitchell stated during debates surrounding the 1990 CAA amendments that the use of court action via citizen suits was necessary, given the limited governmental resources to enforce legislation.<sup>53</sup>

Due to the nature of citizen suits and the structure of the citizen suit provisions in environmental legislation, citizens do not benefit financially from bringing suit.<sup>54</sup> Instead, relief is usually limited to obtaining an injunction, which prevents a defendant from performing harmful and/or illegal actions in the future.<sup>55</sup> This ensures that citizens bring suit with altruistic, not financial, motivation.<sup>56</sup> In performing this public service, a citizen can only be reimbursed for her costs and for attorneys' fees.<sup>57</sup> Even so, citizens, in particular non-profit citizen environmental organizations, have embraced the ability to enforce environmental legislation via citizen suits. Furthermore, the probability of recovering attorneys' fees has increased the feasibility of these suits.

## II. ATTORNEYS' FEES PROVISIONS

### A. *The American Rule*

The American Rule under the common law is that each party must bear its own expenses in litigation, including attorneys' fees.<sup>58</sup> The American Rule differs substantially from the English Rule.<sup>59</sup> English courts award litigation costs to the prevailing party, reasoning that absent another's wrongful conduct, the prevailing party would have had no reason to undergo litigation.<sup>60</sup>

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<sup>52</sup> S. REP. NO. 99-50, at 28 (1985).

<sup>53</sup> See 136 CONG. REC. S3180 (1990) ("Citizen resources are an important adjunct to governmental action to assure that these laws are adequately enforced. In a time of limited governmental resources, enforcement through court action prompted by citizen suits is a valuable dimension of environmental law.")

<sup>54</sup> See *Private Enforcement*, *supra* note 13, at 10,310.

<sup>55</sup> See Murrelet Amicus Brief, *supra* note 51, at 30.

<sup>56</sup> See *Friends of the Earth v. Chevron Chem. Co.*, 885 F. Supp. 934, 939 (E.D. Tex. 1995).

<sup>57</sup> See *id.*

<sup>58</sup> See AXLINE, *supra* note 3, at 8-2.

<sup>59</sup> See Lana Knedlik, Comment, *Attorneys' Fees in Private Party Cost Recovery Actions Under CERCLA: The Key Tronic Decision*, 44 U. KAN. L. REV. 365, 370 (1996).

<sup>60</sup> See *id.* at 371.



Despite scholarly criticism, the Supreme Court has consistently reinforced the American Rule based on several rationales.<sup>61</sup> First, the Court has argued that because the outcome of litigation is at best uncertain, parties should not be penalized for merely defending or prosecuting a lawsuit.<sup>62</sup> Additionally, the Court has held that individuals may be unjustly discouraged from instituting action to vindicate their rights if the law allows for the award of attorneys' fees in all circumstances.<sup>63</sup> The Court has also warned that the availability of attorneys' fees awards may also encourage attorneys to charge exorbitant fees.<sup>64</sup> Finally, the added administrative and financial expense involved in determining the amount of attorneys' fees would excessively burden the judicial system.<sup>65</sup> Congress and the courts have recognized that fee-shifting is appropriate in certain circumstances, and thus have created several exceptions to the American Rule, which soften the Rule's harsh effects.<sup>66</sup> There are both judicial and statutory exceptions to the American Rule.<sup>67</sup>

### B. *Judicially-Created Exceptions to the American Rule*

The federal courts have developed three exceptions to the American Rule: the bad faith exception, the common fund exception, and the private attorneys general exception.<sup>68</sup> The bad faith exception allows courts to award attorneys' fees to a successful litigant whose opponent acted "in bad faith, vexatiously, wantonly, or for oppressive reasons."<sup>69</sup> This type of fee award acts as a punishment and also serves to deter malicious suits.<sup>70</sup> The common fund exception

<sup>61</sup> See Kanad S. Virk, *General Electric Co. v. Litton Industrial Automation Systems, Inc., Are Attorneys' fees Recoverable in CERCLA Private Cost Recovery Actions?*, 75 MINN. L. REV. 1541, 1544 (1991).

<sup>62</sup> See *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967); see also Virk, *supra* note 61, at 1544.

<sup>63</sup> See *Fleischmann*, 386 U.S. at 718. The Supreme Court reaffirmed the American Rule in *Alyeska Pipeline Co. v. Wilderness Society*, indicating that in the United States, the prevailing litigant ordinarily is not entitled to collect a reasonable attorneys' fee from the loser. See 421 U.S. 240, 247 (1975).

<sup>64</sup> See Dean R. Nicyper, Note, *Attorneys' Fees and Ruckelshaus v. Sierra Club: Discouraging Citizens from Challenging Administrative Agency Decisions*, 33 AM. U. L. REV. 775, 784 (1984).

<sup>65</sup> See Virk, *supra* note 61, at 1544.

<sup>66</sup> See Nicyper, *supra* note 64, at 784.

<sup>67</sup> See *id.* at 785, 787; see also *Alyeska Pipeline*, 421 U.S. at 247-49.

<sup>68</sup> See Knedlik, *supra* note 59, at 371; see also Richards M. Stephens, *The Fees Stop Here: Statutory Purposes Limit Awards to Defendants*, 36 DEPAUL L. REV. 489, 489-90 (1987); Nicyper, *supra* note 64, at 785.

<sup>69</sup> See Nicyper, *supra* note 64, at 785 & n.63.

<sup>70</sup> See *Hall v. Cole*, 412 U.S. 1, 5 (1973).

permits courts to award attorneys' fees from a common fund to a litigant who has conferred a benefit on other beneficiaries of the fund who were not litigants.<sup>71</sup> This exception prevents the unjust enrichment of non-litigant beneficiaries at a litigant's expense.<sup>72</sup>

The third judicially-created exception was the short-lived private attorneys general exception.<sup>73</sup> This exception, created to encourage private enforcement of legislation, was ultimately rejected by the Supreme Court.<sup>74</sup> In *Alyeska Pipeline Co. v. Wilderness Society*, the Court determined that the private attorneys general exception granted the courts too much discretion in making award determinations.<sup>75</sup> The Court stated that fees could not be awarded absent a statute authorizing an award of attorneys' fees.<sup>76</sup>

### C. Statutory Exceptions to the American Rule

In addition to judicially-created exceptions, Congress can include attorneys' fees provisions in statutes, which authorize the award of attorneys' fees under certain circumstances.<sup>77</sup> The standard for an award of attorneys' fees varies among individual statutes.<sup>78</sup> The standards range from fee awards only for prevailing parties to the "appropriate standard," which gives the courts discretion to award fees whenever they determine it is "appropriate."<sup>79</sup>

In an effort to encourage citizen suits, Congress included provisions for awards of attorneys' fees in virtually all authorizing legislation.<sup>80</sup> There are now more than 150 federal fee-shifting statutes.<sup>81</sup> By providing compensation for the expenses incurred in bringing suit, Congress has encouraged citizen enforcement of legislation.<sup>82</sup> Without the possibility of an award of attorneys' fees, statutes authorizing citizens to bring such suits would be essentially meaningless because

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<sup>71</sup> See Knedlik, *supra* note 59, at 371; see also Stephens, *supra* note 68, at 489-90; Nicyper, *supra* note 64, at 785.

<sup>72</sup> See Nicyper, *supra* note 64, at 785-86.

<sup>73</sup> See *Sims v. Amos*, 340 F. Supp. 691, 694 (M.D. Ala. 1972) (serving as private attorney general benefits others and entitles plaintiff to fees), *aff'd*, 409 U.S. 942 (1972); see also *Newman v. Piggie Park Enters.*, 390 U.S. 400 (1968).

<sup>74</sup> See *Alyeska Pipeline*, 421 U.S. at 240.

<sup>75</sup> See 421 U.S. at 264; see also Stephens, *supra* note 68, at 491-92.

<sup>76</sup> See *Alyeska Pipeline*, 421 U.S. at 264.

<sup>77</sup> See Nicyper, *supra* note 64, at 787.

<sup>78</sup> See *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 684 (1983).

<sup>79</sup> See *id.*

<sup>80</sup> See *id.*; AXLINE, *supra* note 3, at 8-2.

<sup>81</sup> See *Ruckelshaus*, 463 U.S. at 684.

<sup>82</sup> See AXLINE, *supra* note 3, at 8-2.

no one could afford the costs surrounding litigation.<sup>83</sup> The inherent financial risk surrounding bringing suit would deter citizens from enforcing environmental legislation without the possibility that they would be awarded attorneys' fees.<sup>84</sup>

### 1. The "Appropriate" Standard

The fee-shifting standard in the CAA and the other subsequent environmental statutes is the "appropriate" standard.<sup>85</sup> The "appropriate" standard of awarding attorneys' fees provides that fees may be awarded whenever the court determines they are appropriate.<sup>86</sup> Under the "appropriate" standard, prevailing or substantially prevailing plaintiffs are almost automatically awarded attorneys' fees.<sup>87</sup> The Supreme Court, in an action under a similar fee-shifting provision of Title II of the federal Civil Rights Act, stated that a prevailing plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust."<sup>88</sup> In practice, there are virtually no cases in which a prevailing plaintiff has been denied attorneys' fees.<sup>89</sup> Denying prevailing plaintiffs attorneys' fees defeats the legislative purpose of encouraging legitimate citizen suits.<sup>90</sup>

The "appropriate" standard differs from other fee-shifting provisions because it gives the courts more discretion in fee awards.<sup>91</sup> Other fee-shifting standards had provided specific parameters for awards, such as "prevailing" or "substantially prevailing."<sup>92</sup> Initially, courts had little guidance in determining what was appropriate and regularly held that success was not a prerequisite to an award of fees, but that fees would be awarded when the party promoted the goals of the statute.<sup>93</sup> This led to unsuccessful plaintiffs obtaining awards of attorneys' fees under the premise that they nonetheless were promoting the public interest.<sup>94</sup> Courts also looked to the equitable princi-

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<sup>83</sup> *See id.*

<sup>84</sup> *See id.*

<sup>85</sup> Clean Air Act, § 304(d), 42 U.S.C. § 7604(d) (1994).

<sup>86</sup> *See id.*; Russell & Gregory, *supra* note 17, at 309.

<sup>87</sup> *See Newman*, 390 U.S. at 402; MILLER, *supra* note 7, at 103.

<sup>88</sup> *See Newman*, 390 U.S. at 402.

<sup>89</sup> *See MILLER*, *supra* note 7, at 102 & n.45.

<sup>90</sup> *See id.* at 102.

<sup>91</sup> *See Russell & Gregory*, *supra* note 17, at 307.

<sup>92</sup> *See id.*

<sup>93</sup> *See id.*

<sup>94</sup> *See id.* at 332; *see also Village of Kaktovik v. Watt*, 689 F.2d 222, 222 (D.C. Cir. 1982); *Environmental Defense Fund, Inc. v. EPA*, 672 F.2d 42, 49 (D.C. Cir. 1982) (holding that it

ples underlying the common law exceptions to the American Rule to attempt to award fees only when fair.<sup>95</sup>

In *Ruckelshaus v. Sierra Club*, the Supreme Court brought the practice of awarding fees to unsuccessful plaintiffs to a halt.<sup>96</sup> In *Ruckelshaus*, the Sierra Club filed a request for attorneys' fees, notwithstanding their lack of success on the merits.<sup>97</sup> Respondents founded their argument on Section 307(f) of the CAA, which states that a court may award reasonable attorneys' fees "whenever [the court] determines that such an award is appropriate."<sup>98</sup> The Sierra Club argued that despite their failure to obtain the relief they desired, it was "appropriate" for them to receive attorneys' fees for their contribution to the goals of the CAA.<sup>99</sup> The D.C. Circuit agreed, awarding attorneys' fees to the Sierra Club of approximately \$45,000 and to EDF, the co-plaintiff, of approximately \$46,000.<sup>100</sup> The Supreme Court reversed, holding that even when a substantial benefit is conferred on the public, the courts and EPA could not grant a party an award of attorneys' fees absent some success on the merits.<sup>101</sup> The Court found the practice of awarding fees to unsuccessful plaintiffs inequitable, and held that these awards could no longer be made under the guise of the public interest.<sup>102</sup>

The Supreme Court in *Ruckelshaus* utilized the legislative history of the CAA to determine whether parties other than those who prevail

is "appropriate" to make awards of attorneys' fees without regard to the outcome of the litigation when it serves the public interest); *Alabama Power Co. v. Gorsuch*, 672 F.2d 1, 3 (D.C. Cir. 1982) (per curiam) (holding that the dominant consideration is whether litigation by that party has served the public interest).

<sup>95</sup> See Russell & Gregory, *supra* note 17, at 332-33.

<sup>96</sup> See 463 U.S. at 682. This was a 5-4 decision in which Justice Rehnquist delivered the majority opinion joined by Chief Justice Burger and Justices White, Powell, and O'Connor. Justice Stevens filed a dissenting opinion in which Justices Brennan, Marshall, and Blackmun joined.

<sup>97</sup> See *id.* at 681. In the original suit, the Environmental Defense Fund (EDF) and the Sierra Club challenged the Environmental Protection Agency's (EPA) promulgated standards limiting the emission of sulfur dioxide by coal-burning power plants. See *id.* EDF argued that the standards promulgated by the EPA were tainted by the agency's ex parte contacts with representatives of private industry, while the Sierra Club contended that EPA lacked authority under the CAA to issue the type of standards that it did. See *id.* The Court of Appeals for the District of Columbia rejected all the claims made by EDF and the Sierra Club. See *Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981).

<sup>98</sup> See *Ruckelshaus*, 463 U.S. at 680-82; see also 42 U.S.C. § 7607(f) (1994).

<sup>99</sup> See *Ruckelshaus*, 463 U.S. at 682.

<sup>100</sup> See *Sierra Club v. Gorsuch*, 684 F.2d 972 (D.C. Cir. 1982), *rev'd sub nom.* *Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983).

<sup>101</sup> See *Ruckelshaus*, 463 U.S. at 682.

<sup>102</sup> See *id.* at 686.

on the merits should receive attorneys' fees.<sup>103</sup> The Court concluded that one of the central concerns of Congress when including the fee-shifting provision in the CAA was to provide some check on the multiplicity of potentially meritless suits that Congress feared would follow the addition of citizen suit provisions.<sup>104</sup> Therefore, attorneys' fees awards to parties that do not succeed would be detrimental to that concern.<sup>105</sup>

Justice Stevens's dissent in *Ruckelshaus* stated that Congress intended to give the federal courts discretion in the awarding of attorneys' fees.<sup>106</sup> Justice Stevens also argued that Congress deliberately used language in Section 307(f) of the CAA that differs from the previously used "prevailing party" standard, and that Congress therefore intended to give lower courts discretion to make awards to a broader category of parties.<sup>107</sup> Justice Stevens further contended that if Congress wanted attorneys' fees to be awarded only to prevailing parties, it would have stated that clearly instead of using language leaving discretion to the lower court.<sup>108</sup> Thus, because of the legislative history and the language used by Congress, the dissenters believed the wording of the statute was a deliberate attempt by Congress to broaden the scope of attorneys' fees awards.<sup>109</sup> Justice Stevens's dissent concluded by asserting that the category of what is "appropriate" should be construed narrowly, but that the Court cannot read this standard out of the statute altogether.<sup>110</sup>

After the *Ruckelshaus* decision, it is not appropriate for a federal court to award attorneys' fees absent some degree of success on the merits by the claimant.<sup>111</sup> This decision reaffirms the Supreme Court's commitment to the American Rule, as the Court determined that the practice of awarding fees to unsuccessful plaintiffs was a radical departure from traditional fee-shifting principles and also unfair and inequitable.<sup>112</sup> Although *Ruckelshaus* specifically applied to the CAA,

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<sup>103</sup> See *id.* at 686–94; see also Nicyper, *supra* note 64, at 797.

<sup>104</sup> See *Ruckelshaus*, 463 U.S. at 692–93.

<sup>105</sup> See *id.*

<sup>106</sup> See *id.* at 694 (Stevens, J., dissenting). Justice Stevens was joined by Justices Brennan, Marshall, and Blackmun. See *id.*

<sup>107</sup> See *id.* at 694.

<sup>108</sup> See *id.* at 703–05.

<sup>109</sup> See *Ruckelshaus*, 463 U.S. at 704.

<sup>110</sup> See *id.* at 712.

<sup>111</sup> See *id.*

<sup>112</sup> *Id.* at 681–83; see also Russell & Gregory, *supra* note 17, at 344.

that reasoning has been applied to all statutes that use the "appropriate" standard.<sup>113</sup>

## 2. Determining Fee Awards

Although only a prevailing or substantially prevailing party may be awarded attorneys' fees, the party need not achieve extensive or major success, but the success must still relate to the purposes of the statute involved.<sup>114</sup> Congress departed from the "prevailing party" language in order to expand the class of parties eligible for fee awards from prevailing parties to partially prevailing parties—parties achieving some success, even if they did not achieve major success.<sup>115</sup>

The question of how much success on the merits is necessary for an award of attorneys' fees and whether the amount awarded should correlate with the amount of success is unresolved.<sup>116</sup> Additionally, other than the fact that it is not appropriate to award fees to unsuccessful litigants, there is limited guidance from the Supreme Court to aid the determination of what is appropriate.<sup>117</sup> One of the major drawbacks to the attorneys' fees provisions is the resulting time spent litigating over attorneys' fees for cases that have already been decided on the merits.<sup>118</sup> Courts generally dislike the amount of time spent litigating non-substantive issues related to citizen suits.<sup>119</sup> Nonetheless, courts are often forced to make determinations regarding attorneys' fees for both plaintiffs and defendants.

With plaintiffs, time is spent litigating over the appropriateness of the award and the amount of the award.<sup>120</sup> In *Hensley v. Eckerhart*, the Supreme Court discussed the relationship between the degree of success and the amount of the award with regard to the fee-shifting provision of the Civil Rights Act.<sup>121</sup> The Court indicated that lower courts should examine: (1) the "relatedness" of the claims in the case, and (2) the "level" of success.<sup>122</sup> The Court has consistently interpreted the fee-shifting provisions of the Civil Rights Act and of environ-

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<sup>113</sup> See 463 U.S. at 682 n.1.

<sup>114</sup> See *id.* at 688.

<sup>115</sup> See *id.*

<sup>116</sup> See Russell & Gregory, *supra* note 17, at 311.

<sup>117</sup> See *Ruckleshaus*, 463 U.S. at 683; Russell & Gregory, *supra* note 17, at 311.

<sup>118</sup> See *AXLINE*, *supra* note 3, at 8-3.

<sup>119</sup> See *id.*

<sup>120</sup> See *id.*

<sup>121</sup> See *Hensley v. Eckerhart*, 461 U.S. 424, 430 (1983).

<sup>122</sup> *Id.* at 434.

mental statutes similarly—thus, it is likely courts will apply the *Hensley* analysis to determine what is the “appropriate” award in environmental cases.<sup>123</sup>

Parties also spend court time litigating over fees for defendants.<sup>124</sup> Defendants try to obtain attorneys’ fees under two circumstances.<sup>125</sup> First, when they believe the suit was frivolous or harassing.<sup>126</sup> Second, defendants try to obtain fees as the prevailing party.<sup>127</sup> Courts are forced to make determinations regarding whether suits are frivolous, harassing, or without foundation.<sup>128</sup> The Court in *Christiansburg Garment Co. v. EEOC* warned district courts that when making these assessments they must

resist the understandable temptation to engage in post hoc reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation. This kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success.<sup>129</sup>

Although much of the debate in the higher courts has focused on plaintiffs’ attorneys’ fees, prevailing defendants have been fighting for plaintiffs to pay their attorneys’ fees when they are the prevailing parties.<sup>130</sup> Thus far, defendants have only been awarded attorneys’ fees in limited circumstances.<sup>131</sup>

#### D. *The Nature of Citizen Suits Necessitates Awards of Attorneys’ Fees*

Citizens who bring suit to enforce environmental statutes normally do so on behalf of the community, and not typically for personal gain.<sup>132</sup> Because of this, there are few incentives for citizens to bring suit, and many disincentives.<sup>133</sup> The possibility of the award of attorneys’ fees if successful is only a limited incentive for attorneys to rep-

<sup>123</sup> See AXLINE, *supra* note 3, at 8–8.

<sup>124</sup> See *id.* at 14.

<sup>125</sup> See *id.*

<sup>126</sup> See *id.*

<sup>127</sup> See *id.*

<sup>128</sup> See AXLINE, *supra* note 3, at 14.

<sup>129</sup> 434 U.S. 412, 421–22 (1978).

<sup>130</sup> See, e.g., Steel Co. Brief, *supra* note 5, at 3.

<sup>131</sup> See E. RICHARD LARSON, FEDERAL COURT AWARDS OF ATTORNEYS’ FEES 85–97 (1981).

<sup>132</sup> See AXLINE, *supra* note 3, at 8–1.

<sup>133</sup> See *id.*

resent citizen groups.<sup>134</sup> If a group does not prevail, the attorney is likely not to receive compensation.<sup>135</sup> Additionally, if that citizen plaintiff is only partially successful, the fee award is likely to be reduced. Even if the citizen group is the prevailing party, there is likely to be a dispute over fees, which may result in a second round of major litigation. Therefore, it may be several years before the attorney receives compensation, and even then, the attorney is not usually compensated adequately for the actual amount of effort put into the suit.<sup>136</sup>

Due to the substantial risk involved with environmental litigation, attorneys' fees provisions are necessary for such suits to be effective.<sup>137</sup> The complex and technical nature of environmental litigation, coupled with complications of proof, together lead to enormous expenses.<sup>138</sup> Citizen plaintiffs often face defendants, such as the government and private industry, with vast resources to defend their cases.<sup>139</sup> Without attorneys' fees provisions, citizens often would not have the resources to finance a suit because the contingency fee system usually employed in litigation with under-funded clients is unavailable as these suits can seek only injunctive, not monetary relief.<sup>140</sup> Citizens usually do not have the personal resources to contribute to the regulation of the environment, nor sufficient personal stake in the suit to contribute the amount necessary to prosecute usually well-funded defendants.<sup>141</sup>

In the first major case awarding attorneys' fees under the "appropriate" standard, the First Circuit stated that "the lack of measurable interest on the part of any individual member of the public, and the difficulties inherent in complex litigation in a rapidly developing field of law, make the economics of citizen suits a serious problem."<sup>142</sup> Additionally, environmental public interest groups are commonly non-profit groups with unreliable sources of funding, such as membership dues and donations.<sup>143</sup> Courts have recognized the need for attorneys' fees provisions for effective enforcement—without them,

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<sup>134</sup> See *id.* at 8–2.

<sup>135</sup> See *id.* at 8–3.

<sup>136</sup> See *id.* at 8–2–8–3.

<sup>137</sup> See Russell & Gregory, *supra* note 17, at 326–27.

<sup>138</sup> See *id.*

<sup>139</sup> See *id.*

<sup>140</sup> See *id.* at 327.

<sup>141</sup> See *id.*

<sup>142</sup> Natural Resources Defense Council v. EPA, 484 F.2d 1331, 1334 (1st Cir. 1973).

<sup>143</sup> See Russell & Gregory, *supra* note 17, at 327.



the citizen suit provisions of these statutes would be largely ineffective.

### III. AWARDS OF ATTORNEYS' FEES FOR PREVAILING DEFENDANTS

There is a dual standard in the awarding of attorneys' fees.<sup>144</sup> This dual standard generally holds prevailing defendants to a stricter standard in determining whether an award is "appropriate."<sup>145</sup> Courts follow the standard set by the Supreme Court in *Christiansburg Garment Co. v. EEOC*,<sup>146</sup> a Civil Rights Act case. Courts follow this civil rights case as precedent for environmental cases because the fee shifting provisions and the legislative intent of environmental legislation are similar to civil rights legislation.<sup>147</sup> The *Christiansburg* standard states that a prevailing defendant may recover fees only if it can show that a "plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith."<sup>148</sup>

The Court in *Christiansburg* stated two "strong [and] equitable" considerations for awarding plaintiffs attorneys' fees, while greatly restricting defendants' ability to obtain attorneys' fees under the Civil Rights Act.<sup>149</sup> First, under Title II of the Civil Rights Act, citizen plaintiffs are Congress's chosen instrument to vindicate "a policy that Congress considered of the highest priority."<sup>150</sup> Second, when attorneys' fees are awarded to the prevailing plaintiff, the party bearing the costs is the party that violated the law.<sup>151</sup> The Court concluded that these factors are absent when considering a fee award to a prevailing defendant.<sup>152</sup>

In *Christiansburg*, the prevailing defendant, Christiansburg Garment Company, petitioned for attorneys' fees against the EEOC pursuant to Section 706(k) of the Civil Rights Act's Title VII.<sup>153</sup> The dis-

<sup>144</sup> See David Berger, *Court Awards of Attorneys' Fees: Litigating Antitrust, Civil Rights, Public Interest and Securities Cases—Prevailing Party Concepts in Court Awards of Attorneys' Fees*, 324 *PLI/Lit.* 41, 77 (1987).

<sup>145</sup> See *AXLINE*, *supra* note 3, at 8–14; Miller, *supra* note 7, at 108; Berger, *supra* note 144, at 77.

<sup>146</sup> 434 U.S. 412 (1978).

<sup>147</sup> See *AXLINE*, *supra* note 3, at 8–14 n.64.

<sup>148</sup> See *Christiansburg*, 434 U.S. at 418.

<sup>149</sup> See *id.*

<sup>150</sup> *Id.*; see *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402 (1968).

<sup>151</sup> See *Christiansburg*, 434 U.S. at 418.

<sup>152</sup> See *id.* at 418–19.

<sup>153</sup> See *id.* at 415. Section 706(k) states that "[i]n any action or proceeding under this title the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee. . . ." § 706(k), 42 U.S.C. § 2000e-5(k) (1994).

strict court found that the Commission's action in bringing suit was not unreasonable or meritless; therefore, an award of attorneys' fees to the defendant was unjustified.<sup>154</sup> A divided Fourth Circuit affirmed the decision.<sup>155</sup> The Supreme Court discussed the legislative history of Section 706(k) of Title VII in determining that defendants can obtain attorneys' fees only when the action was frivolous, unreasonable, or without foundation.<sup>156</sup> The Court cited directly to the legislative history of Section 706(k), which states that the fee provision was included in the statute to "make it easier for a plaintiff of limited means to bring a meritorious suit."<sup>157</sup> Furthermore, the Court observed that in the history of Title II's fee-shifting provision, an almost identical attorney fee provision to Title VII, members of the Senate explained that its allowance of awards to defendants in limited circumstances would serve "to deter the bringing of lawsuits without foundation," "to discourage frivolous suits," and "to diminish the likelihood of unjustified suits being brought."<sup>158</sup> The Court stated that Congress wanted not only to make it easier for plaintiffs to bring suit, but also to protect defendants from burdensome litigation having no legal or factual basis.<sup>159</sup>

Another policy consideration supporting the dual standard is that attorneys' fees awards to prevailing plaintiffs are made against the defendant, a violator of the federal law.<sup>160</sup> Not only does this further the notion that awards to plaintiffs are equitable, it also appears to show that awards have another purpose—to serve as a punishment against those who violate the law.<sup>161</sup> Awarding fees partially to punish does not apply to plaintiffs as they should not be punished for bringing a legitimate lawsuit.<sup>162</sup> However, it is clear that plaintiffs should be "punished" for bringing a frivolous or harassing suit by being required to pay the prevailing defendants' attorneys' fees in those circumstances.<sup>163</sup>

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<sup>154</sup> See *Christiansburg*, 434 U.S. at 415.

<sup>155</sup> See *id.* at 415.

<sup>156</sup> See *id.* at 420–21.

<sup>157</sup> *Id.* at 420 (1978).

<sup>158</sup> *Id.*

<sup>159</sup> See *Christiansburg*, 434 U.S. at 420.

<sup>160</sup> See *id.* at 418.

<sup>161</sup> See Russell & Gregory, *supra* note 17, at 358.

<sup>162</sup> See *id.*

<sup>163</sup> See *id.*

Thus, fee awards to plaintiffs and defendants differ substantially in nature and serve different purposes.<sup>164</sup> A fee award to plaintiffs serves to encourage legitimate citizen suits by allowing citizens and attorneys to bring suit with the prospect of receiving attorneys' fees from the losing defendant, while at the same time serving as a punishment for environmental law violations.<sup>165</sup> A fee award to defendants serves to discourage illegitimate or meritless suits brought by citizen organizations or private citizens solely to harass or embarrass the defendant.<sup>166</sup> Additionally, a fee award to defendants serves as a punishment against the citizen plaintiffs that bring meritless suits for illegitimate purposes.<sup>167</sup> Although fee awards to both plaintiffs and defendants have legitimate purposes, their purposes are often quite different and apply only when certain criteria are met.<sup>168</sup>

A. *Legislative Intent to Limit Awards of Attorneys' Fees to Defendants Under Environmental Statutes*

The *Christiansburg* decision created the dual standard in the awarding of attorneys' fees.<sup>169</sup> This dual standard created by *Christiansburg* resulted from a deliberate collusion between Congress and the Supreme Court in an effort to enable plaintiffs with little or no capital to bring suit, while simultaneously attempting to deter meritless suits.<sup>170</sup> When drafting the language of the attorneys' fees provision of the CAA, the Act's authors in the Senate were cognizant that their wording left the door open for defendants to recover attorneys' fees.<sup>171</sup> This was a deliberate attempt to encourage legitimate citizen suits and discourage illegitimate suits.<sup>172</sup> The resulting language was the very essence of the legislative compromise between proponents of the citizen suit provision and opponents who feared it would flood the federal courts with litigation.<sup>173</sup> Opponents of the citizen suit provision of the CAA feared it would encourage frivolous and harassing suits. This fear prompted the Senate to add the possibil-

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<sup>164</sup> See *Christiansburg*, 434 U.S. at 418–419.

<sup>165</sup> See AXLINE, *supra* note 3, at 8–8; Russell & Gregory, *supra* note 17, at 329.

<sup>166</sup> See Nicyper, *supra* note 64, at 798.

<sup>167</sup> See *Stephens*, *supra* note 68, at 514–17.

<sup>168</sup> See generally Nicyper, *supra* note 64.

<sup>169</sup> See *Christiansburg*, 434 U.S. at 418–19.

<sup>170</sup> See Berger, *supra* note 144, at 77–78.

<sup>171</sup> See MILLER, *supra* note 7, at 98.

<sup>172</sup> See *id.*

<sup>173</sup> See *id.* at 108.

ity of the award of attorneys' fees to defendants in such circumstances.<sup>174</sup> Initially, the language of the legislation used the phrase "in the public interest" as opposed to "when appropriate," to state when fees would be awarded.<sup>175</sup> The phrase "in the public interest" was seen as not only encouraging legitimate suits with the possibility of an award of attorneys' fees, but also awarding fees to defendants when it was in the public interest, such as discouraging harassing suits.<sup>176</sup>

In floor debate, Senator Hruska, a vocal critic of the citizen suit provision, contended that a citizen suit provision would "result in a multiplicity of suits which [would] interfere with the Executive's capability of carrying out his or her duties and responsibilities."<sup>177</sup> In rebuttal, Senators Muskie and Hart, key sponsors of the legislation, argued that the possibility of awarding attorneys' fees to defendants would discourage harassing and frivolous suits.<sup>178</sup> They reasoned that the threat of bearing the costs of the parties against whom the citizens brought the suit, along with their own litigation costs, would deter any frivolous or harassing suits.<sup>179</sup> In sum, the available legislative history suggests that Congress intended that the fee-shifting provision of the CAA allow for defendants to recover attorneys' fees when appropriate, implying that it is only appropriate when the action is frivolous or harassing.<sup>180</sup>

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<sup>174</sup> See S. REP. NO. 91-1196, at 36-39 (1970); LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1970 436-39 (1972) (hereinafter CAA70 LEG. HIST.). The Senate report stated:

Concern was expressed that some lawyers would use Section 304 to bring frivolous and harassing actions. The Committee has added a key element in providing that the courts may award costs of litigation, including reasonable attorney and expert witness fees, whenever the court determines that such action is in the public interest. The court could thus award costs of litigation to defendants where the litigation was obviously frivolous or harassing. This should have the effect of discouraging abuse of this provision, while at the same time encouraging the quality of the actions that will be brought.

S. REP. NO. 91-1196, at 36-39.

<sup>175</sup> See MILLER, *supra* note 7, at 98. As one can see from the above quote, this change was not mentioned in the conference report, and the analysis continued to explain the standard as "in the public interest." *Id.* at 99.

<sup>176</sup> See S. REP. NO. 91-1196, at 36-39 (1970); CAA70 LEG. HIST., *supra* note 174, at 436-39.

<sup>177</sup> *Id.*

<sup>178</sup> See *id.*

<sup>179</sup> See CAA70 LEG. HIST., *supra* note 174, at 280-81 (Statement of Sen. Muskie).

<sup>180</sup> See MILLER, *supra* note 7, at 108.

### B. Judicial Interpretation

The Supreme Court has interpreted the legislative intent of fee-shifting provisions as disallowing defendants' recovery of attorneys' fees absent a frivolous or harassing suit.<sup>181</sup> The reasoning behind denying defendants attorneys' fees lies in the burden that the award would place on plaintiffs. The risk of bearing this burden, it is argued, would substantially undercut the efforts of Congress to promote the citizen enforcement of federal legislation.<sup>182</sup> Courts recognize the risks involved with citizen plaintiffs bringing suit and recognize that citizen plaintiffs often face defendants with more resources.<sup>183</sup> Courts also recognize that Congress tried to even the balance by providing incentives for bringing meritorious lawsuits by treating successful plaintiffs more favorably than successful defendants in terms of the award of attorneys' fees.<sup>184</sup>

Although the Supreme Court has not applied this standard to defendants outside of civil rights litigation, given the similarity between the fee-shifting provisions of each piece of legislation, it appears the Court would apply the *Christiansburg* standard to environmental fee-shifting provisions as well.<sup>185</sup> When defendants have been awarded attorneys' fees for defending against frivolous, harassing, or foundationless suits, courts have occasionally considered other factors, such as the plaintiffs' inability to pay or status as a non-profit organization, in reducing or eliminating the award to defendants.<sup>186</sup> In these circumstances, even if the case was determined to be frivolous, harassing, or without merit, courts have found it inequitable to award attorneys' fees due to the circumstances.<sup>187</sup>

In *Christiansburg*, the Supreme Court made a distinction between allowing fee awards to defendants when the suit was frivolous, harassing or meritless and allowing fee awards for merely defending a le-

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<sup>181</sup> See *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 523 (1994); *Christiansburg*, 434 U.S. at 422.

<sup>182</sup> See *Christiansburg*, 434 U.S. at 422.

<sup>183</sup> See *Fogerty*, 510 U.S. at 523.

<sup>184</sup> See *id.*

<sup>185</sup> See AXLINE, *supra* note 3, at 8-14 n.64.

<sup>186</sup> See Dan B. Dobbs, *Awarding Attorney Fees Against Adversaries: Introducing the Problem*, 1986 DUKE L.J. 435, 449; see also *Faraci v. Hickey-Freeman Co.*, 607 F.2d 1025, 1028-29 (2d Cir. 1979) (awarding \$200 attorneys' fee to defendant due to defendant's financial distress); *Ingram v. Madison Square Garden Center, Inc.*, 709 F.2d 807, 814 (2d Cir. 1983) (awarding defendant fees because it was "a non-profit association comprised primarily of members who earn their living with their hands").

<sup>187</sup> See AXLINE, *supra* note 3, at 8-14 n.64.

gitimate suit.<sup>188</sup> It is seen as equitable for defendants to receive compensation in the form of attorneys' fees when they have been forced to defend a lawsuit brought solely to harass and embarrass.<sup>189</sup> However, it is seen as inequitable to compensate defendants for merely defending a legitimate lawsuit, while simultaneously punishing the citizen plaintiffs who brought a legitimate suit and simply lost.<sup>190</sup>

### C. Defendants' Arguments for Attorneys' fees

Defendants continue to question the *Christiansburg* standard which so limits their ability to obtain attorney fee awards.<sup>191</sup> In *Citizens for a Better Environment v. The Steel Company*<sup>192</sup>—a case now on remand from the Supreme Court regarding the defendant's request for attorneys' fees—the defendant's request for attorneys' fees was ultimately denied on jurisdictional grounds, but the defendant's arguments on the merits of the claim offer insight into a typical defendant's reasoning.<sup>193</sup> Defendants argued in *Steel Co.* that Congress intended to provide a fee-shifting mechanism to soften the burden any prevailing party would bear in litigating its case, including defendants.<sup>194</sup> The Steel Company also asserted two main arguments in support of the motion for attorneys' fees.<sup>195</sup> First, The Steel Company argued that

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<sup>188</sup> See generally *Christiansburg v. EEOC*, 434 U.S. 412 (1978).

<sup>189</sup> See *id.*

<sup>190</sup> See *id.*

<sup>191</sup> See generally *Steel Co. Brief*, *supra* note 5.

<sup>192</sup> See *id.* The original case was decided by the Supreme Court on March 4, 1998, which held that the Court lacked subject matter jurisdiction, and thus dismissed the case. See *Citizens for a Better Environment v. The Steel Co.*, 118 S.Ct. 1003, 1009–1021 (1998). The Supreme Court held that the citizens “lack[ed] standing to maintain [the] suit and we and the lower courts lack jurisdiction to entertain it.” *Id.* at 1021. Thus, although the plaintiffs won in the Seventh Circuit, the defendants were ultimately the prevailing party, but on jurisdictional grounds, not on the merits. See *id.* The defendants violated the federal Emergency Planning and Community Right to Know Act (EPCRA) for seven years. See *id.* at 1009. However, because The Steel Company was in compliance with EPCRA at the time the suit was filed, the Court determined that CBE lacked standing to bring suit. See *id.*

<sup>193</sup> See *Citizens for a Better Env't v. The Steel Co.*, 1999 WL 412439 (N.D. Ill. 1999). The district court utilized the Supreme Court's language from their decision in this case on the merits: “[a]n interest in attorneys' fees is ... insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim.” 118 S.Ct. 1003, 1019 (1998). In the original case, the Supreme Court determined that no Article III case or controversy existed because there was no longer an EPCRA violation—thus, there would not be an Article III case or controversy to establish jurisdiction to determine attorneys' fees. See *Steel Co.*, 1999 WL 412439 at \*2. The decision did not discuss The Steel Co.'s arguments on the merits. See *id.*

<sup>194</sup> See *Steel Co. Brief*, *supra* note 5, at 2.

<sup>195</sup> See generally *Steel Co. Brief*, *supra* note 5.

their efforts in litigating the case served the public interest by assisting the interpretation and implementation of the Emergency Planning and Community Right to Know Act (EPCRA), and their efforts ought to be a factor in determining an attorney fee award.<sup>196</sup> Second, they contended that the *Christiansburg* standard for awards of attorneys' fees does not apply to cases filed under EPCRA.<sup>197</sup>

The Steel Company's first argument suggested that Congress intended EPCRA's Section 326(f) fee authorization not only to encourage the participation of citizen plaintiffs, but also to encourage defendant's participation in resolving important and difficult questions of constitutional and statutory interpretation and in implementing the statute.<sup>198</sup> By awarding fees to defendants as well, the Steel Company proposed, courts could ensure a vigorous defense and a balanced presentation of views.<sup>199</sup> In short, this argument posited that the possibility of attorneys' fees would encourage defendants to defend their case more vigorously.<sup>200</sup>

The Steel Company further suggested that Congress intended the determination of whether or not a fee award is "appropriate" to be at the discretion of the courts and limited only in that the party must prevail.<sup>201</sup> Although the standard for awards of attorneys' fees under EPCRA is the "appropriate" standard, it provides no explicit factors or guidelines for the courts.<sup>202</sup> Thus, The Steel Company contended that Congress intended to allow prevailing defendants to receive attorneys' fees in circumstances beyond frivolous suits because it did not explicitly limit fee awards solely to parties defending a frivolous action.<sup>203</sup>

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<sup>196</sup> See *id.* at 5-7. The Ninth Circuit case of *Carson-Truckee Water Conservancy Dist. v. Secretary of Interior*, 748 F.2d 523 (9th Cir. 1984), which awarded attorneys' fees to prevailing defendants whenever the defendant's actions "substantially contributed" to the goals of the ESA, was recently held to no longer be good law by the Ninth Circuit based upon the Supreme Court's ruling in *Pennsylvania v. Delaware Valley Citizens' Council*. See 478 U.S. 546, 558-560 (1986); *Marbled Murrelet v. Pacific Lumber Co.*, 182 F.3d 1091, 1094-1095 (9th Cir. 1999). *Delaware Valley* held that attorneys' fees provisions in environmental statutes with similar language and purpose as the attorneys' fees provision in the Civil Rights Acts should be interpreted in the same way. See 478 U.S. at 558-60. That case also clarified that the *Christiansburg* standard under the Civil Rights Act also applied to citizen suits arising under environmental legislation. See *id.*

<sup>197</sup> See Steel Co. Brief, *supra* note 5, at 7-12.

<sup>198</sup> See *id.* at 3.

<sup>199</sup> See *id.*

<sup>200</sup> See *id.*

<sup>201</sup> See *id.* at 5.

<sup>202</sup> See Steel Co. Brief, *supra* note 5, at 5.

<sup>203</sup> See *id.*

The defendants additionally argued in *Steel Co.* that several courts have reasoned that the dominant consideration in determining whether a fee award is "appropriate" should be whether the party's efforts have "served the public interest by assisting the interpretation and implementation of the statute."<sup>204</sup> The Steel Company urged that in determining whether an award is appropriate, courts should consider: (1) whether the party assisted the judicial interpretation of the statute; (2) whether the issues involved were novel and important; and, (3) whether the case furthered understanding of the statute.<sup>205</sup> Because their efforts in defending the suit had provided a benefit to the public and the judiciary by aiding in the correct interpretation of EPCRA, defendants believed they were entitled to attorneys' fees.<sup>206</sup>

The second argument was that the *Christiansburg* standard does not apply to EPCRA.<sup>207</sup> The defendants argued that the language of the statute does not endorse the dual standard of treating prevailing plaintiffs and defendants differently.<sup>208</sup> Congress made no distinction between parties and instead left it to the courts' discretion to determine when it would be appropriate to award attorneys' fees to a prevailing party.<sup>209</sup> The Steel Company asserted that when Congress has intended to set forth a dual standard such as the one articulated in *Christiansburg*, it has done so explicitly in the language of the statute, such as in the Administrative Procedure Act and certain antitrust legislation.<sup>210</sup> The EPCRA provision for attorneys' fees states that the court may award fees "to the prevailing or substantially prevailing party whenever [it] determines such an award is appropriate."<sup>211</sup> This standard does not compel the application of the *Christiansburg* standard, but instead, defendants argued, indicates Congress's preference for an evenhanded approach, which would treat prevailing plaintiffs and defendants equally.<sup>212</sup>

The defendants' argument also suggested that EPCRA's fee-shifting provision should be seen as nearly identical to that found in the Copyright Act.<sup>213</sup> The Supreme Court had held in *Fogerty v. Fan-*

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<sup>204</sup> See *id.* at 6; see also *supra* note 183 and accompanying text.

<sup>205</sup> See *Steel Co.* Brief, *supra* note 5, at 4.

<sup>206</sup> See *id.*; see also *supra* note 183 and accompanying text.

<sup>207</sup> See *Steel Co.* Brief, *supra* note 5, at 7-12.

<sup>208</sup> See *id.*

<sup>209</sup> See *id.* at 8.

<sup>210</sup> See *id.* at 9-10.

<sup>211</sup> *Id.*

<sup>212</sup> See *Steel Co.* Brief, *supra* note 5, at 9-10.

<sup>213</sup> See *id.*



*tasy, Inc.*<sup>214</sup> that prevailing plaintiffs and defendants must be treated alike under the fee-shifting provision of the Copyright Act.<sup>215</sup> The Steel Company argued that since the language of the two statutes is similar, and neither statute's legislative history suggests that prevailing plaintiffs and defendants should be treated differently, the two statutes should be interpreted similarly.<sup>216</sup>

Additionally, The Steel Company drew a distinction between the policy considerations at work in *Christiansburg* under the Civil Rights Act and in environmental citizen litigation.<sup>217</sup> The defendants' brief observed that the Supreme Court had stated in *Christiansburg* that "impecunious 'private attorney general' plaintiffs can ill afford to litigate their claims against defendants with more resources."<sup>218</sup> The defendants then claimed that the Court had tried to provide an incentive to plaintiffs for bringing meritorious lawsuits, by treating successful plaintiffs more favorably than successful defendants due to the great risk citizen plaintiffs encounter when bringing civil rights suits.<sup>219</sup> The defendants claimed that the citizens in environmental citizen suits differ from those in civil rights suits as they are not individuals aiming to vindicate their rights.<sup>220</sup> In environmental citizen litigation, noted the defendants, the plaintiffs usually tend to be large, well-funded organizations devoted to bringing environmental lawsuits.<sup>221</sup> Defendants stated that this makes the typical environmental plaintiff more akin to the so-called behemoth referred to by the Supreme Court in *Fogerty*, the copyright case, than the impecunious plaintiffs in civil rights cases.<sup>222</sup>

The Steel Company further suggested that environmental plaintiffs differ from civil rights plaintiffs in that these citizen suits are not Congress's preferred method of enforcement.<sup>223</sup> Although Congress had provided for citizens to be influential in environmental enforcement, the defendants argued that they were meant merely to supple-

<sup>214</sup> 510 U.S. 517 (1994).

<sup>215</sup> Compare *Christiansburg*, 434 U.S. at 420–423, with Steel Co. Brief, *supra* note 5, at 10–12 (comparison showing the policy considerations at work in a civil rights case, and what defendants suggest is the policy consideration behind environmental citizen suits).

<sup>216</sup> See Steel Co. Brief, *supra* note 5, at 10.

<sup>217</sup> See *id.*

<sup>218</sup> See *id.*

<sup>219</sup> See *id.*

<sup>220</sup> See *id.*

<sup>221</sup> See Steel Co. Brief, *supra* note 5, at 11. For example, CBE, who brought suit against The Steel Co., has over 30,000 members and 180,000 contributors. See *id.*

<sup>222</sup> See *id.*

<sup>223</sup> See *id.*

ment the efforts of the government in the area of environmental enforcement, whereas, in the civil rights cases, citizens are Congress's "chosen instrument."<sup>224</sup> The arguments put forth by The Steel Company were similar to the arguments made by the defendant in *Marbled Murrelet v. Pacific Lumber Co.*<sup>225</sup> In *Marbled Murrelet*, the Ninth Circuit relied on the reasoning in *Christiansburg* when holding that the defendants were not entitled to attorneys' fees because the suit was not frivolous, harassing or unreasonable.<sup>226</sup>

#### IV. THE ROLE OF JUDICIAL DISCRETION IN FEE AWARDS

Both the legislative history and the case law surrounding attorneys' fees awards state that defendants can only obtain attorneys' fees in very limited circumstances.<sup>227</sup> The environmental statutes themselves state that fees can be awarded to any party when the court determines an award is "appropriate."<sup>228</sup> This language, however, is somewhat misleading as awards are certainly more limited than the statute on its face seems to indicate.<sup>229</sup> Congress appears to have intended to grant the courts discretion in determining when an award is appropriate and what the extent of that award should be.<sup>230</sup> The legislative history further shows that the intent was not to give the courts the discretion to award fees to prevailing defendants in all circumstances.<sup>231</sup>

The courts have interpreted the legislative history and clarified the meaning of "appropriate" in the context of attorneys' fees provisions.<sup>232</sup> First, the *Ruckelshaus* decision eliminated awards to unsuccessful plaintiffs, and later the *Christiansburg* decision restricted awards to defendants to limited circumstances.<sup>233</sup> Aside from these limitations, courts have the ability to award fees at their discretion, i.e., when "appropriate."<sup>234</sup>

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<sup>224</sup> See *id.*

<sup>225</sup> See *Murrelet* Amicus Brief, *supra* note 51; see also *Marbled Murrelet*, 182 F.3d at 1096.

<sup>226</sup> *Marbled Murrelet*, 182 F.3d at 1096.

<sup>227</sup> See *supra* notes 110–28 and accompanying text.

<sup>228</sup> See *id.*

<sup>229</sup> See *id.*

<sup>230</sup> See *id.*

<sup>231</sup> See generally S. REP. NO. 91–1196 (1970).

<sup>232</sup> See *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 686–94 (1983); *Christiansburg v. EEOC*, 434 U.S. 412, 418–23 (1978).

<sup>233</sup> See *id.*; see also *supra* notes 84–101 and accompanying text.

<sup>234</sup> See *Russell & Gregory*, *supra* note 17, at 355–56.

Given the unique nature of citizen suits, it is only "appropriate" to award fees when it is equitable to do so. After *Ruckelshaus*, citizens face the risk of paying their own attorneys' fees if they do not prevail.<sup>235</sup> The added risk of paying a defendant's attorneys' fees could deter even the most enthusiastic citizens from bringing suit because the financial risk would be too great.<sup>236</sup> The court in *Friends of the Earth v. Chevron Chemical Company* stated that "[t]o place upon these citizen plaintiffs the speculative hazard of paying defendant's attorneys' fees and costs would likely have an undesirable effect. Such a hazard would have a chilling effect upon citizens bringing enforcement action . . . ."<sup>237</sup>

### A. Legislative Purpose of Attorneys' fees Provisions

The statutory language of the typical environmental statute could lead one to conclude that both plaintiffs and defendants can obtain attorneys' fees when appropriate.<sup>238</sup> The statutes were not, however, designed to give equal treatment to litigants because, absent statutes to the contrary, parties are generally equal under the American Rule and each side pays their own costs.<sup>239</sup> With further investigation into the legislative history and the intent behind such provisions, it appears that Congress did not intend for defendants to receive attorneys' fees for merely prevailing in a lawsuit.<sup>240</sup> There is no indication that Congress or the courts desired to stray from the current American Rule.<sup>241</sup> Although the statutory award of attorneys' fees is permitted, these statutes cannot completely override the purpose of the American Rule itself.<sup>242</sup>

Careful study indicates that Congress had three goals in view when creating the attorney fee provisions of environmental citizen suits.<sup>243</sup> First, Congress intended to increase the feasibility of citizen suits by decreasing the burden citizens themselves would bear.<sup>244</sup> Second, the specific language of the typical attorneys' fees provision was

<sup>235</sup> See generally *Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983).

<sup>236</sup> See Murrelet Amicus Brief, *supra* note 51, at 32.

<sup>237</sup> 885 F. Supp. 934, 939 (E.D. Tex.) (1995).

<sup>238</sup> See *Consolidated Edison Co. of New York v. Realty Inv. Ass'n, L.P.*, 524 F. Supp. 150, 152 (1981).

<sup>239</sup> See *Stephens*, *supra* note 68, at 497.

<sup>240</sup> See *supra* notes 110-20 and accompanying text.

<sup>241</sup> See *id.*

<sup>242</sup> See *supra* notes 51-87 and accompanying text.

<sup>243</sup> See *supra* notes 33-47 and accompanying text; Nicyper, *supra* note 64, at 791-92.

<sup>244</sup> See *AXLINE*, *supra* note 3, at 8-2.

intended to increase judicial discretion in the award of attorneys' fees.<sup>245</sup> The purpose of the language "when appropriate" was to give the courts more discretion in their awarding of fees, allowing them the ability to award fees not only to prevailing parties, but also to parties that only partially prevail.<sup>246</sup> Finally, Congress intended to limit or prevent frivolous suits from burdening the courts as a result of the citizen suit provisions.<sup>247</sup> This was done by allowing defendants to obtain attorneys' fees when the suit was determined to be frivolous or harassing.<sup>248</sup>

### 1. Increasing the Feasibility of Citizen Suits

Allowing the routine award of attorneys' fees to prevailing defendants would have a chilling effect on citizen enforcement of environmental legislation. In order to ensure the effectiveness of citizen suit provisions, Congress provided fee-shifting provisions in environmental legislation to encourage citizens to engage in socially beneficial litigation.<sup>249</sup> Common sense suggests that increasing defendants' ability to recover attorneys' fees would significantly decrease the ability of citizens to bring suit.<sup>250</sup>

The suggestion that the dual purpose of attorneys' fees provisions is to encourage defendants to aid in resolving difficult questions of constitutional and statutory interpretation must be seen as a stretch.<sup>251</sup> Coupled with the above notion, defendants have proposed that without the possibility of attorneys' fees, the costs of litigating environmental citizen suits would hinder defendants' ability to put forth a vigorous defense to guarantee the courts that both sides will be advocated.<sup>252</sup> However, common sense indicates that the possibility of attorneys' fees would not propel defendants to strongly advocate their case—the possibility of losing the suit and paying both damages and the plaintiff's attorneys' fees is usually more than enough of an encouragement to ensure a balanced presentation of views. Defending an environmental citizen suit is a great expense, but to suggest that

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<sup>245</sup> See *supra* notes 96–100 and accompanying text; Nicyper, *supra* note 64, at 791.

<sup>246</sup> See *Ruckelshaus*, 463 U.S. at 704 & n.14.

<sup>247</sup> See *supra* notes 106–19 and accompanying text.

<sup>248</sup> See *id.*

<sup>249</sup> See *supra* notes 79–100 and accompanying text.

<sup>250</sup> See *Russell & Gregory*, *supra* note 17, at 326–27 & n.91.

<sup>251</sup> See *Steel Co. Brief*, *supra* note 5, at 3.

<sup>252</sup> See *id.*

without the prospect of attorneys' fees this expense would hinder the case put forth by defendants is almost certainly an overstatement.

Although the defendants' efforts in the *Steel Co.* case in the end served to aid in the interpretation of EPCRA and thus served the public interest, there is nothing in that statute's legislative history to suggest that attorneys' fees should be awarded to defendants in such circumstances.<sup>253</sup> The underlying purpose of the fee-shifting provisions and the legislative history clarify why defendants should not be able to recover attorneys' fees even when they serve the public interest.<sup>254</sup> In creating attorney's fee provisions, Congress was concerned that individuals interested in protecting their environment would be forced to forego enforcement of environmental laws because of the lack of a financial stake in the outcome and a lack of resources with which to bring the suit.<sup>255</sup>

The risk of losing the suit would deter these individuals from filing a cause of action when, even if successful, they would gain little personally.<sup>256</sup> Thus, fee-shifting provisions were designed to take the sting out of litigation in order to encourage private citizens to enforce laws for the greater good of the general public.<sup>257</sup> The fee-shifting provisions provide for the award of fees to plaintiffs in order to encourage litigation—routine awards of attorneys' fees to defendants would frustrate that purpose.<sup>258</sup> Citizens considering bringing suit would have to consider not only the potential of their loss and paying their own costs, but the possibility of paying their opponents' fees as well.<sup>259</sup> This would deter citizen suits and be directly contrary to the legislative intent behind the attorneys' fees provisions.<sup>260</sup>

Additionally, one must consider the fundamental difference between plaintiffs and defendants in citizen suits.<sup>261</sup> Defendants in their primary argument for attorneys' fees have stated that the dominant consideration in the awarding of attorneys' fees should be whether the party's efforts have served the public interest by assisting the interpretation and implementation of a statute, irrespective of what side

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<sup>253</sup> See *supra* notes 156–67 and accompanying text.

<sup>254</sup> See *supra* notes 139–68 and accompanying text.

<sup>255</sup> See *supra* notes 157–68 and accompanying text.

<sup>256</sup> See Stephens, *supra* note 68, at 497.

<sup>257</sup> See *id.*

<sup>258</sup> See *id.*

<sup>259</sup> See *id.*

<sup>260</sup> See *supra* notes 68–94 and accompanying text.

<sup>261</sup> See *supra* notes 130–38, 142–56 and accompanying text.

of the case the party was on.<sup>262</sup> This has neglected the reality that defendants are usually litigating to avoid liability rather than for an altruistic concern for the public benefit regarding the correct interpretation of a statute or the enforcement or non-enforcement of a particular law.<sup>263</sup> Benefiting the public may ultimately result from the litigation, but this is not usually the driving force behind a successful defense.

On the contrary, a citizen plaintiff has no reason to bring suit other than for the benefit of the public—there is no personal financial reward at stake for citizens. Defendants should not be “rewarded” for successfully defending a suit with the payment of attorneys’ fees by the plaintiffs. In such a case, plaintiffs who brought a legitimate suit against a defendant would be responsible for their fees merely for losing the case. This certainly would deter citizen suits, if not make them non-existent, and is contrary to the underlying purpose of the citizen suit provisions.

It is, however, legitimate that plaintiffs would be responsible for the attorneys’ fees of defendants if the court determined the suit was frivolous, harassing, or unreasonable, even if it was not brought in bad faith.<sup>264</sup> This is so because a defendant should not be responsible for defending against an illegitimate suit brought by a plaintiff.<sup>265</sup> Awarding fees for defending a frivolous suit and awarding fees for merely defending a legitimate suit are quite different, and the Supreme Court clearly made this distinction in *Christiansburg*.<sup>266</sup>

## 2. Judicial Discretion in Awarding Attorney Fees

Congress gave judges the discretion to award attorneys’ fees when “appropriate.”<sup>267</sup> Although guided by *Ruckelshaus* and *Christiansburg*, courts are otherwise given considerable leeway under the “appropriate” standard for the exercise of discretion in awarding fees.<sup>268</sup> The *Ruckelshaus* decision sets the minimum requirement of some level of success, or “nontrivial” success, but a litigant who satisfies that re-

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<sup>262</sup> See *Steel Co. Brief*, *supra* note 5, at 6.

<sup>263</sup> See *Stephens*, *supra* note 68, at 493.

<sup>264</sup> See *supra* notes 110–28 and accompanying text.

<sup>265</sup> See *id.*

<sup>266</sup> See generally *Christiansburg*, 434 U.S. at 412.

<sup>267</sup> See S. REP. NO. 95-127, at 99 (1977); LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1977 1473 (1978).

<sup>268</sup> See *supra* notes 87–118 and accompanying text.

quirement is still not necessarily entitled to an award.<sup>269</sup> As the defendants correctly asserted in *Steel Co.*, courts continue to possess wide discretion in determining the appropriateness of making an award.<sup>270</sup> This discretion, however, should be guided by the legislative history of the fee-shifting provisions and governed by principles of equity, which defendants routinely fail to consider when advocating for unfettered judicial discretion. In following this reasoning, the courts' discretion must be narrowed to preserve the viability of citizen suits in environmental enforcement. Defendants argue that Congress provided no explicit factors to guide the courts' discretion. While this is true, the legislative history offers deeper insight into the purpose of the provisions, which can aid the courts' determination of appropriate attorneys' fees awards.

Although the courts have discretion in the awarding of attorneys' fees, their decisions must remain consistent with the underlying purpose of the fee-shifting provisions. Additionally, although the principles of equity have not been used frequently to state how courts should determine fee awards, equity has still governed the courts' practice.<sup>271</sup> Even prior to the decision in *Ruckelshaus*, courts were granting fee awards based upon the principles of equity.<sup>272</sup> This has led courts in many circumstances to grant awards to plaintiffs who were not successful, but who furthered the purpose of the statute.<sup>273</sup> Although this practice is now precluded by the *Ruckelshaus* decision, the rationale remains in making decisions about what is an appropriate fee award.<sup>274</sup> Furthermore, equity principles are what govern the common law awards of fees to defendants when courts determine a suit was brought by a plaintiff in bad faith.

In determining the appropriateness of a fee award, courts must consider whether the award would be fundamentally fair.<sup>275</sup> Some commentators believe that litigants should be awarded fees if they have provided a public benefit unless it would be unfair to make such an award.<sup>276</sup> Under this theory, defendants argue that they are enti-

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<sup>269</sup> See Russell & Gregory, *supra* note 17, at 354.

<sup>270</sup> See *supra* notes 87-110 and accompanying text.

<sup>271</sup> See, e.g., *Natural Resources Defense Council, Inc. v. EPA*, 484 F.2d 1331 (1st Cir. 1973).

<sup>272</sup> See *id.*

<sup>273</sup> See *id.*

<sup>274</sup> See Russell & Gregory, *supra* note 17, at 352; *Hensley v. Eckerhart*, 462 U.S. 424, 430-434 (1983).

<sup>275</sup> See Russell & Gregory, *supra* note 17, at 357-58.

<sup>276</sup> See *id.* at 356.

tled to fees when they provide a public benefit as the prevailing party.<sup>277</sup> Others contend that defendants should only be awarded fees if they were forced to defend a frivolous or harassing suit; otherwise, it goes against fundamental notions of fairness.<sup>278</sup> The latter argument is consistent with the legislative intent behind the attorneys' fees provisions. It would be fundamentally unfair and would undermine the citizen suit provisions of environmental legislation to force citizens to pay defendants' fees in suits which were not found to be frivolous, harassing, or unreasonable.

Fee awards are also considered a punishment to defendants for violating federal law.<sup>279</sup> When defendants are found not guilty, meaning the court found they did not violate the law, equity holds that they should not be punished for defending that suit—they should not pay plaintiffs' attorneys' fees. This is essentially what the Supreme Court held in *Ruckelshaus*.<sup>280</sup> When plaintiffs bring a valid citizen suit, the underlying reason is presumably to advance the public welfare.<sup>281</sup> Even if they lose, their purpose was to protect the public and the environment.<sup>282</sup> In following this rationale, awarding defendants attorney's fee when they simply prevail would unnecessarily punish the plaintiffs—the citizens—for bringing that suit. This was clearly not the intent of the attorneys' fees provisions of citizen suits.<sup>283</sup>

Basing an award of fees upon the principles of equity would not only restrict the recovery of fees for defendants, but also would limit the recovery of fees by plaintiffs to only when it is fair or equitable. Thus, fees should not be awarded to unsuccessful plaintiffs as that would not be equitable, and would violate the courts' fundamental notions of fairness. Additionally, the award of fees should decrease correspondingly with the amount of success the plaintiff achieves. A plaintiff achieving minimal success should not be able to recover all its fees from the defendant. Likewise, a plaintiff's success on issues not relating to a violation of the statute should also be restricted to keep the award equitable.

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<sup>277</sup> See Steel Co. Brief, *supra* note 5, at 2-6.

<sup>278</sup> See *Ruckelshaus*, 463 U.S. at 685; see also *supra* notes 169-79 and accompanying text.

<sup>279</sup> See Russell & Gregory, *supra* note 17, at 358.

<sup>280</sup> See *Ruckelshaus*, 463 U.S. at 680.

<sup>281</sup> See *supra* notes 47-50 and accompanying text.

<sup>282</sup> See *id.*

<sup>283</sup> See *supra* notes 68-94 and accompanying text.



### 3. Curtailing Frivolous Suits

Congress stated specifically the limited circumstances that warrant an award of attorneys' fees to defendants in the debates prior to the passage of the attorneys' fees provision of the CAA.<sup>284</sup> This implies that defendants outside of those limited circumstances should not be awarded fees.<sup>285</sup> It stands to reason that Congress would not have stated a particular instance when defendants can be awarded fees if they generally can be awarded for merely prevailing.

Congress discussed the importance of providing a check on citizen suits in order to prevent a potential flood of illegitimate suits intended solely to harass defendants.<sup>286</sup> This was one of the reasons the attorneys' fees provision was included in the CAA.<sup>287</sup> However, this check was intended to curtail frivolous suits, not citizen suits in general.<sup>288</sup> The legislative history of the CAA clearly indicates that allowing defendants to obtain attorneys' fees when frivolous or harassing suits are brought will curtail these types of suits.<sup>289</sup> Put simply, Congress did not leave open the door for defendants to obtain fees based solely on the outcome of the case. To the contrary, members of Congress specifically stated that the fee-shifting provision was intended to encourage legitimate suits and discourage illegitimate suits.<sup>290</sup> The only way this is possible is to allow fees to plaintiffs and defendants when it is equitable, which for defendants means that such awards are limited to cases which were determined to be frivolous, harassing, or unreasonable.

#### B. *Judicial Precedent*

Defendants continue to fight for attorneys' fees when they are the prevailing party, but only one court has awarded a prevailing defendant fees and it did so without any analysis of what standard should be applied.<sup>291</sup> Although the Supreme Court has yet to decide whether the fee-shifting provisions of the environmental statutes allow prevailing defendants to receive awards absent a frivolous or harassing law-

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<sup>284</sup> See *supra* notes 110–20 and accompanying text.

<sup>285</sup> See *id.*

<sup>286</sup> See *id.*

<sup>287</sup> See *id.*

<sup>288</sup> See *id.*

<sup>289</sup> See S. REP. NO. 91-1196, at 36–39 (1970).

<sup>290</sup> See *Ruckelshaus*, 463 U.S. at 687.

<sup>291</sup> See *Sierra Club v. Shell Oil*, 817 F.2d 1169, 1176 (5th Cir. 1987); see also *supra* notes 106–28 and accompanying text.

suit, the vast majority of courts continue to follow the *Christiansburg* standard in which the Supreme Court denied a defendant fees under Title VII of the Civil Rights Act.<sup>292</sup> Defendants in *Steel Co.* argued that the *Christiansburg* standard does not apply to EPCRA.<sup>293</sup> This cannot be the case. The *Christiansburg* standard should be applicable to all fee-shifting provisions of statutes that provide for citizen suits. There is nothing about the fee-shifting provision in EPCRA which differentiates it from other environmental fee-shifting provisions or the Civil Rights Act's fee-shifting provisions.<sup>294</sup> Thus, it should be interpreted in the same manner, following the *Christiansburg* standard.

The fee-shifting provisions of Title VII and of the environmental statutes are similar and have been consistently interpreted in the same way.<sup>295</sup> Thus, this is a legitimate precedent for courts to apply to all similar environmental fee-shifting provisions in citizen suits. Applying this precedent limits a given defendant's ability to obtain attorneys' fees. There is, however, undoubtedly a need for this restriction. Without limiting a defendant's ability to obtain fees, citizen suits would be too great a financial risk for citizens to take, and thus, these suits would be extremely limited if not eliminated as a viable option.<sup>296</sup>

Although fee-shifting provisions of other statutes allow for fee-shifting for both plaintiffs and defendants, these statutes are drastically different from statutes that allow citizen suits.<sup>297</sup> The defendants in *Steel Co.* argued that the fee-shifting provision of EPCRA is more similar to the fee-shifting provision of the Copyright Act.<sup>298</sup> Although the terms of the provisions are similar, this approach fails to consider the underlying fundamental difference between citizen suits and other types of suits because of the uniqueness of the plaintiff and the nature of the suit in the former context.<sup>299</sup> This distinction separates environmental statutes from other statutes with fee-shifting provisions that allow defendants to obtain fees as the prevailing party. Additionally, the language of EPCRA is similar to the language of other envi-

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<sup>292</sup> See *Christiansburg*, 434 U.S. at 412.

<sup>293</sup> See *Steel Co. Brief*, *supra* note 5, at 7-16.

<sup>294</sup> See, e.g., CAA, 42 U.S.C. § 7401-7671 (1994); EPCRA, 42 U.S.C. § 11046 (1994).

<sup>295</sup> See *Stephens*, *supra* note 68, at 498; see also *AXLINE*, *supra* note 3, at 8-14 & n.64.

<sup>296</sup> See *supra* notes 71-87 and accompanying text.

<sup>297</sup> See, e.g., Copyright Act, 17 U.S.C. § 505 (1994). The Copyright Act states that "the court may ... award a reasonable attorneys' fee to the prevailing party as part of the costs." *Id.*

<sup>298</sup> See generally *Steel Co. Brief*, *supra* note 5. Compare EPCRA, 42 U.S.C. § 11046(f), with Copyright Act, 17 U.S.C. § 505 (1994).

<sup>299</sup> See *supra* notes 130-38 and accompanying text.

ronmental statutes, and the *Christiansburg* standard has routinely been applied to those statutes by the courts.<sup>300</sup> Defendants may also argue that it is unfair or inequitable to award fees to one side when they prevail but not to the other. As discussed above, fee awards should be based in equity. However, It does not follow that defendants should recover fees merely because they have prevailed—it is rarely equitable to do so.

### CONCLUSION

The award of attorneys' fees has traditionally been grounded in equity and should continue to be so grounded. Judges are granted the discretion to award fees when "appropriate"—i.e., when it is equitable. To allow otherwise would seriously frustrate the purpose of the attorneys' fees provisions, and almost certainly have a chilling effect on the employment of citizen suits to enforce environmental legislation. Attorneys' fees awards play a major role in the ability of citizens to bring suit on behalf of the public in an attempt to enforce environmental laws. Without these awards, citizens would have to bear the cost of bringing suit themselves, a burden which undermines the prospect of citizen suits.

These same awards also deter citizens from bringing suits which are frivolous or harassing by allowing fees to defendants in those particular circumstances. In order for citizen suits to continue to play a vital role in the enforcement of environmental law, prevailing defendants should not be able to obtain attorneys' fees for merely prevailing. Additionally, judges should not adhere to a set standard of granting fees to any prevailing plaintiff as individual circumstances may suggest that awards, even to prevailing plaintiffs, are not always appropriate. Instead, judges should base their determinations on the principles of equity and on the individual facts of the case, and trust that the resulting award of fees is fair and just.

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<sup>300</sup> Compare EPCRA, 42 U.S.C. § 11046(f), with Solid Waste Disposal Act, 42 U.S.C. § 6972(e) (1994).